86-25 (1)

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

THE BURGGRAF CORPORATION, an Oklahoma corporation, and DISCOUNT TIRES OF OKLAHOMA, INC., an Oklahoma corporation, by and through LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, shareholders, and LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, individually,

Petitioners,

-vs-

THE GOODYEAR TIRE & RUBBER COMPANY, a corporation, THE LEE TIRE & RUBBER COMPANY, a corporation, THE KELLY-SPRINGFIELD TIRE COMPANY, a corporation, CLARENCE BURGGRAF, SR., SHIRLEY BURGGRAF, L. K. NEWELL and GEORGE UTTERBACK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI AND MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July, 1986

5-14-87

QUESTIONS PRESENTED

This case presents a summary decision of the United States Court of Appeals for the Tenth Circuit which departed from the accepted intent and purposes of appellate procedure by inadvertently deferring to the appeal thwarting tactics of the respondents. The effect was an arbitrary denial of any right of appeal from the unjust and unlawful orders of the District Court raising questions of fundamental and Constitutional importance warranting this Court to grant this petition for certiorari review, and to issue a writ of mandamus to the Court of Appeals directing consideration of the entire appeal record and the making of findings of fact affording a clear understanding of its decision. The questions are:

1) Whether the Court of Appeals arbitrarily presumed, as interlocutory and non-appealable, and refused to hear and consider those orders challenged as exceeding and abusing the authority of the District Court in operating to defeat the accepted intent of the Robinson-Patman Act, and applicable rules, by terminating essential discovery and effectively dismissing all tire sales claims as sanctions for the failure to allege detail facts, and by permitting the defendants to provide appeal thwarting and emptied detail tire sales allegations for trial? And did such arbitrary preclusion deprive the petitioners of their property interests in a due and equal right of appeal under the law?

2) Whether applying the non-appeal sanction after refusing to consider the unjust and terminating effect of the prior orders in weighing the discretion exercised by the District Judge in the dismissal, with prejudice, of inferred claims on the conclusory ground that "plaintiffs are unprepared to proceed to trial", constituted an arbitrary departure from accepted appellate intent and purposes and created precedent for the implied power of a District Court to thwart any right of appeal from its unjust and unlawful orders and thus defeat the accepted Congressional intent of 28 U.S.C. Section 1291?

3) Whether the conclusory nature of the summary denial of any right of appeal from the prior orders and conclusory dismissal requires undue speculation as to the factual basis of the decision and warrants a remand, or issuance of a writ of mandamus, directing the Court of Appeals to comply with its duty to consider the entire appeal record and make findings of fact affording a clear understanding by petitioners and this Court of the basis of the opinion?

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IN THE
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NO._____

THE BURGGRAF CORPORATION, an Oklahoma corporation, and DISCOUNT TIRES OF OKLAHOMA, INC., an Oklahoma corporation, by and through LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, shareholders, and LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, individually,

Petitioners,

-vs-

THE GOODYEAR TIRE & RUBBER COMPANY, a corporation, THE LEE TIRE & RUBBER COMPANY, a corporation, THE KELLY-SPRINGFIELD TIRE COMPANY, a corporation, CLARENCE BURGGRAF, SR., SHIRLEY BURGGRAF, L. K. NEWELL and GEORGE UTTERBACK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI AND MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, The Burggraf Corporation, an Oklahoma corporation, and Discount Tires of Oklahoma, Inc., an Oklahoma corporation, by and through Lola Burggraf, Jerry Burggraf and Larry Burggraf, shareholders, and Lola Burggraf, Jerry Burggraf and Larry Burggraf, individually ("Burggrafs"), respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Tenth Circuit entered on February 10, 1986, and July 3, 1984, and that a writ of mandamus issue to the Court of Appeals directing a review of the entire appeal record and the making of findings of fact affording a clear understanding of the basis for its decision. A reversal is warranted.

OPINIONS BELOW

The February 10, 1986 opinion of the Court of Appeals is unpublished but reproduced in Appendix "A", infra, 1 a- 2 a. Its April 7, 1986 order denying a rehearing is reproduced in Appendix "B", infra 3 a- 4 a. Its June 25, 1984 summary opinion in denying the issuance of a writ of mandamus to the district Court is reproduced in Appendix "C", infra, 5 a- 5 . Its July 1, 1986 opinion denying Rule 60(b) relief from the District Court's orders is reproduced in Appendix "J", infra, 23 a- 23 a.

The orders and opinion of the District Court relevant to this petition were entered on December 2, 1983, reproduced as Appendix "D", infra, 6 a- 7 a; February 28, 1984, reproduced as Appendix "E", infra, 8 a- 10 a; April 18, 1984, reproduced as Appendix "F", infra, 11 a- 16 a; June 25, 1984, reproduced as Appendix "G", infra, 17 a- 18 a; and the order of dismissal entered on July 3, 1984, reproduced as Appendix "H", infra, 19 a- 20 a.

JURISDICTION

The judgment and summary opinion of the Court of Appeals was entered on February 10, 1986. Its opinion denying a rehearing was entered on April 7, 1986. The jurisdiction of this Court is invoked under the authority of 28 U.S.C. Sections 1254(1) and 1651.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The authority for the complaint and power of the District Court arises from the pertinent provisions of the Robinson-Patman Act, 15 U.S.C. Section 13(a),(c),(d),(f), reproduced in Appendix "I", infra, 21 a- 22 a.

The appellate provision of 28 U.S.C. Section 1291 expresses:

> "The Court of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, * * *."

The pertinent provision of the Fifth Amendment to The Constitution of the United States is:

> "No person shall * * * be deprived of * * * property, without due process of law * * *."

STATEMENT OF THE CASE

1. The Robinson-Patman Complaint.

On December 14, 1982, the individual petitioners as owners of approximately one-half of the stock of the family owned Burggraf Corporations, filed a representative complaint under Section 2 of the Clayton Act, the Robinson-Patman Act, 15 U.S.C. Section 13. The complaint alleged against respondents, The Goodyear Tire and Rubber Company, a corporation, The Lee Tire and Rubber Company, a corporation, the Kelly-Springfield Tire Company, a corporation ("Corporate Defendants"), Clarence Burggraf, Sr., Shirley Burggraf, L. K. Newell and George Utterback ("Burggraf Directors") general facts of unlawful pricing damage to Burggraf from millions of tires purchased over a period of years from the Corporate Defendants and that the Corporate Defendants were guilty of direct and indirect price discrimination in their contemporaneous sales of tire of like grade and quality to other customers.

The complaint alleged the complicity of the Corporate Defendants with the Burggraf Directors in said wrongful pricing for their benefit and to the detriment of Burggraf. The Corporate Defendants and Burggraf Directors filed their answers in March, 1983 without challenge of the sufficiency of the generally stated tire sales allegations.

2. The Unjust. Unlawful and Appeal Thwarting Orders.

At a Status Conference conducted on December 1, 1983, the first hearing before the District Court held in advance of the requested Discovery Conference scheduled before the U.S. Magistrate on December 15, 1983, the defendants sought to effectively defeat the accepted intent and purpose of the Robinson-Patman Act and of Rule 8, F.R.Civ.P., by asserting their defensive right to require the Burggrafs to possess and provide detail facts in support of the generally stated tire sales damage allegations. The detail facts were available only from the essential records of the Corporate Defendants which were later produced at a nine day discovery conference commencing on January 9, 1984 and revealed to be coded with the Corporate Defendants denying possession of the cross-referencing or computer means to decode the same.

At said first hearing, the Corporate Defendants informed the District Court that there were 82 lines and 568 sizes and types of the Star brand tires sold to Burggraf and 76 lines and 531 types and sizes of the Multimile brand tires sold to the separate customer, TBC. They asserted their right to know when, where and to whom the sales of tires of like grade and quality were sold.

The resulting order of December 2, 1983 provided uncertain allegations requirements as follows:

> Plaintiffs are to provide defendants with all alleged instances of contemporaneous sales of products which violate the Robinson-Patman Act by January 23, 1984 (App. D, 7 a).

Because of the millions of compared tire sales involved over a period of years, Burggraf viewed said allegations requirement as requiring a narrowing of the Corporate Defendants' target customers and complied by a letter of January 23, 1984 comparing the tires purchased by Burggraf to those continuously sold to the other customers, TBC. Before computer decoding was possible, said letter speculated two sets of referenced invoices to be of like grade and quality to show the good faith for the complaint pending a decoding after the essential records were received.

By subsequent construction of said order of December 2, all of the Burggrafs' generally stated tire sales allegations were dismissed in an indirect but effective manner. Without the benefit of a second hearing with the parties, the District Court, by its order of February 28, 1984 (App. E 10 a), accepted the Corporate Defendants' contentions that the two examples supplied by Burggrafs' letter of January 23, 1984, were competent detail allegations. It ruled that, if by March 9, 1984, Burggraf does not provide "any additional alleged instances, they will be restricted to asserting only two instances previously alleged", and also cut off essential discovery (id. at 10 a).

Before receiving said order of February 28, 1984, the Burggrafs by letter of March 1, 1984 provided the defendants with five manually selected and contemporaneous tire sales invoices to the two customers as sales showing price differences compared by their product codes to a common factory code, i.e., the same basic green tire. Such examples were, again, supplied to show the good faith of the complaint pending successful decoding of the Corporate Defendants' records. An attempted computer decoding of 8,641 compared tire sales was supplied by March 9, 1984.

By the order of April 18, 1984, the District Court found that "plaintiffs do not indicate which sales at which locations on what dates and at what prices violated the act" and construed the order of December 1 as requiring detail facts for the allegations (App. F 13 a). The seven examples provided by Burggraf to show the

good faith of their complaint were, in turn, offered by the Corporate Defendants and accepted by the District Judge as Burggrafs' allegations for the scheduled trial (id. at 14 a).

The order of April 18, 1984 granting summary judgment vaguely but effectively terminatated the essential claim of complicity between the defendants (id. at 15 a). Such ruling caused the affirmative defense of customer reference to become a second and complete bar to any sales allegations, including the emptied allegations provided by the defendants. The cut off of essential discovery provided the earlier bar to the gathering of the proof that the price differences were unjustified.

The sales allegations unjustly supplied by the Corporate Defendants and unlawfully approved by the District Court, for the Burggrafs, violated the intent of Rule 15(a), F.R.Civ.P., and the liberal purpose and intent of the Robinson-Patman Act, which Act does not require detail proof. However, all allegations lawfully alleged by Burggraf were effectively dismissed and the detail allegations, as unjustly and unlawfully supplied for the Burggrafs, operated to thwart and confuse the clear rights of appeal.

On May 22, 1984, the Burggrafs filed their motion for relief from the unjust orders and requested a second wave of essential discovery. The motion was supported by a breaking of the code displayed by computer exhibits showing $1,200,000.00 in direct price discrimination from a small portion of the Corporate Defendants' records.

On June 15, 1984, the Burggrafs received an informal communication from the District Judge that the motion was denied. On June 22, 1984, the Burggrafs sought mandamus relief from the Court of Appeals in No. 84-1877. On June 25, 1984, the Court of Appeals denied the relief sought as being required to be raised from a final decision (App. C; 5 a).

On June 25, 1984, the District Court formally denied the motion (App. G 17 a).

On June 27, 1984, Burggraf reviewed both decisions and advised the Court below and the defendants that nothing existed for trial.

At the July 2, 1984 trial scheduled for the purported tire sales allegations, the Burggrafs renewed their motions for relief from the unjust orders which terminated all tire sales claims and had caused proof to be impossible, and advised the Court that nothing existed for trial.

The resulting order of dismissal entered on July 3, 1984 made no reference to the renewed motion for relief and did not comment on Burggrafs' statement that nothing existed for trial. It impliedly dismissed the detail sales allegations earlier supplied by the Corporate Defendants for Burggraf with the unjust permission of the Court, by conclusory findings, as follows:

> As the plaintiffs are unprepared to proceed to trial, and upon application of defendants, the Court hereby dismisses with prejudice the plaintiffs' claims against defendants, for failure to prosecute, pursuant to F.R.Civ.P. 41(b) (App. H 20 a).

The finding that "plaintiffs are unprepared to proceed to trial" is consistent with the Burggfraf statement to the trial Judge that no claims remained because of the unjust orders from which relief was sought. What tire sales claims, actually alleged by the Burggrafs, did the Burggrafs intentionally and unreasonably fail to prosecute? The unlawful supplying of detail allegations by the Corporate Defendants and the trial judge operated, with the conclusory dismissal, to imply the existence of triable claims for the now obvious purpose of successfully thwarting any right of appeal.

3. The Appeal.

The appeal from the dismissal gave primary emphasis to the unreasonable nature of the prior orders in cutting off essential discovery and creating an allegations impossibility under the Robinson-Patman Act, with unripe summary judgements, terminating the

sales claims. After the formal briefing, the Burggrafs supplied the clarifying focus to the prior orders subverting the accepted intent of Rule 8, F.R.Civ.P, and the Robinson-Patman Act by supplemental authorities and reasons pursuant to Rule 28(j), Federal Rules of Appelate Procedure. Such suppplement of July 24,1985 as stricken not being in conformity with the Rule. The Burggrafs revised supplement was stricken. Supplemental authorities, without reasons in support, were submitted on August 20,1985.

Page four of the Answer Brief of the Corporate Defendants provided for the Court of Appeals a mirror image of the defendants' undue tactical claim of their defensive right to subvert the accepted intent of the applicable law and rules of proper procedure declared by this Court. It reads, in pertinent part, as follows:

> The complaint * * * charged * * * unspecifically that the corporate defendants had "directly" and "indirectly" discriminated against the plaintiff corporations in "prices, terms, discounts and other benefits given to preferred customers, dealers and wholesalers for tires of like grade and quality." * * * It did not give corporate defendants any information as to what sales plaintiffs' were complaining about, where or when and to whom they were allegedly made, or what tires were involved. In short, the complaint was so unspecific that there was no way for the corporate defendants to know whether there was a factual basis for the plaintiffs' claims, or what defenses might be available to corporate defendants.

Such defense created a mirror image for the Court of Appeals to grasp the unjust and unlawful nature of the orders rendered prior to the formal dismissal. However, those issues arising from the prior orders were not considered by the Court of Appeals.

4. The Conclusory Denial Of Any Right Of Appeal.

The February 10, 1986 judgment and summary opinion of the Court of Appeals (App. B 1 a- 2 a) correctly discerned that the prior orders resulted in the plaintiffs' refusal to proceed to

trial. However, it presumed that the orders were interlocutory with no final and dismissing affect and that those orders were "not properly before us".

Consequently, the Court of Appeals did not consider the prior orders and their unjust and terminating effect in weighing the exercise of discretion of the trial court in dismissing the inferred claims, with prejudice, in the vague and conclusory order of dismissal. By such preclusion and deference to the trial judge by the inference of the existence of valid and triable claims for trial, the Court of Appeals arbitrarily and unreasonably found no abuse of discretion. Moreover, by misapplying the non-appeal sanction after denial of the right of appeal from presumed interlocutory orders, all rights of appeal intended under 28 U.S.C. Section 1291 were summarily denied in a conclusory manner.

The timely filed petition for rehearing sought attention to the unlawful and void nature of the prior orders and their terminating effect. However, by the decision entered on April 7, 1986 (App. B 3 a- 4 a), the Court of Appeals declined to provide the Burggrafs with a rehearing and, consequently, any right of appeal. Moreover, it imposed the sanction for double costs for a frivolous appeal and allowed attorney's fee sanctions against the Burggrafs attorney to be heard by the trial judge.

Under these exceptional circumstances and desiring justified relief without the necessity of this petition, the Burggrafs filed their motion for relief from the district court order under Rule 60(b), F.R.Civ.P. directly with the Court of Appeals. The motion asserted fraud upon the district court and the Court of Appeals and the void nature of the orders in essentially the same vein as presented by this petition. Writ relief was also sought. Such relief was summarily denied by the decision of the Court of Appeals entered on July 1, 1986 (App. J 23 a).

REASON FOR GRANTING THE WRITS

The writs should be granted for the fundamental reason that the combined effect of the opinions of the lower courts operate to contravene the intent of the law and the constitutional protections declared by this Court. The departures were indirect but effective.

This case presents the summary thwarting of any right of appeal from the usurping powers of the orders of the trial court which operated by subtle indirection, to defeat the petitioners' Robinson-Patman claims by subverting the liberal intent declared by this Court for the subject matter authority, the Robinson-Patman Act, and its just rules of procedure declared for the federal courts. By failing to exercise its duty to consider the terminating and unjust effect of the orders, presumed as merely interlocutory, the Court of Appeals inadvertently endorsed the oppressive orders and wrongful conduct of the defendants. This operated to defeat the Burggrafs' right to a fair and impartial hearing in litigation proceedings and to effectively defeat any right of appeal.

The subtle indirection of the prior orders combined with the conclusory nature of the dismissal, with prejudice, emphasis the just and important reason for the mandate of clear fact findings as required by this Court in Rule 52(a), F.R.Civ.P. Moreover, the conclusory nature of the summary decision of the Court of Appeals requires the petitioners and this Court to speculate the exact reasons for the denial of any right of appeal from the injustice and oppression at the trial court level.

1. The Usurpation Of Powers By The Trial Judge.

Seven months after the answers were filed, the Corporate Defendants asserted their defensive right to detail facts and obtained the order of December 2, 1983. This subtle order, as later construed, effectively dismissed all tire sales claims in a manner designed to confuse and thwart the right of appeal by allowing the Corporate Defendants to provide emptied detail allegations for the

Petitioners. The combination of orders forced an oppressive trial confrontation with a conclusory dismissal, with prejudice and by design, to thwart any right of appeal through the vehicle of the gray area of the trial court's discretion.

The sequence of orders from December 2, 1983 through the dismissal with prejudice entered on July 3, 1984 are excerpted, in pertinent part, as follows:

> December 2 - Plaintiffs are to provide defendant with all alleged instances of contemporaneous sales of products which violate the Robinson-Patman Act by January 23, 1984 (App. D 7 a).
>
> February 28 - If plaintiffs fail to provide any additional instances, they will be restricted to asserting only the two instances previously alleged (by defendants). * * * the court hereby denies the request for an extension of * * * discovery * * * . (App. E 10 a)(parenthetical added).
>
> April 18 - Plaintiffs do not indicate which sales at which locations on what dates and at what prices violated the Act * * *. Plaintiffs have alleged the following instances of contemporaneous sales (seven provided by the defendants, (APP. F 13, 14 a). * * * plaintiffs claims * * * kickbacks in return for buying their tires * * * corporate defendants are entitled to summary judgment (id. at 15 a)(parenthetical added).
>
> June 25 - Plaintiffs contend corporate defendants made material misrepresentations * * * plaintiffs' motion is without merit and should be overruled. With regard to plaintiffs' offer of new evidence, (Computer printouts of decoding of partial records showing $1,200,000.00 in direct price differences, unrefuted), it appears to the court that the evidence also fails to identify with sufficient specificity the alleged contemporaneous sales (App. G 17 a- 18 a) (parenthetical added).

July 3 - As the plaintiffs are unprepared to proceed to trial, and upon application of defendants, the court hereby dismisses with prejudice the plaintiffs' claims against defendants, for failure to prosecute, pursuant to F.R.Civ.P. 41(b) (App. H 20 a).

As shown by the following authorities, said orders subtly operate to defeat the intent of the law and its due processes of the law.

"The respondents also argue that the complaint failed to set forth specific facts to support its general allegations * * * The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the rules require is a 'short and plain statement of the claims that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Conley v. Gibson (1957), 355 U.S. 41, 2 L.Ed.2d 80,85. Applied to Robinson-Patman claims, "only a general statement of the facts from which the defendant may form a responsive pleading is necessary or permissable." New Home Appliance Center v. Thompson (CA 10th 1957), 250 F.2d 881,883; Wright & Miller, Federal Practice and Procedure: Civil Section 1221 (1969).

"It does not come with good grace" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted. * * * Any other rule would enable the wrongdoer to proceed by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain." J.Truett Payne Co. v. Chrysler Motors Corp. (1981), 451 U.S. 557, 101 S.Ct. 1923,1929; Bigelow v. RKO Radio Pictures (1946), 327 U.S. 251, 66 S.Ct. 574,580. "It is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose." Cort v. Ash (1975), 422 U.S. 66, 45 L.Ed.2d 26,40.

The federal rules are "supported by a grant of federal authority contained in Article I or some other section of the Constitution."

Hanna v. Plumer (1965), 380 U.S. 460, 85 S.Ct. 1136,1144. The federal rules and their policy are "binding" on the federal courts. Hickman v. Taylor (CA 3rd 1945), 153 F.2d 211,219, affirmed, 67 S.Ct. 385. The scope and just intent of the rules was declared by this Court in Rule 1, F.R.Civ.P., as follows:

> These rules govern the procedure in the United States district courts in all suits of civil nature whether cognizable as cases at law or in equity * * * They shall be construed to secure the just, speedy and inexpensive determination of every action.

The orders approving the claim of defensive right to detail facts operated to defeat the just intent of Rule 8, F.R.Civ.P., as declared by this Court in Conley v. Gibson, supra. Because this Court in J.Truett Payne declared that the wrongdoer may not "insist upon specific and certain proof" which would allow "wrongdoing so effective and complete in every case as to preclude any recovery", the dismissal of all tire sales claims for failure to allege detail facts operated to subvert and arbitrarily defeat this Court's declaration of the intent of the trial court's subject matter authority.

No decisions have been found which construe Rule 15(a), F.R.Civ.P., by allowing defendants and the federal courts to provide allegations for the plaintiffs. This particularly applies t detail allegations which are prohibited as being required by this Court and the Court of Appeals. In submitting to the fraudulent claim of the defensive right to detail facts by dismissing all of the petitioners' generally stated tire sales allegations, and by allowing the defendants to supply fact allegations for the petitioners, which allegations were wholly emptied by the effect of prior rulings, the orders of the District Court operated to thwart any right of appeal and to subvert the law itself.

No record other than the orders of the District Court, appendixed in this brief, are necessary to show the usurpation of power which operated to defeat the intent of the law and the due process rights of

the petitioners at the trial and appellate level. The quote from page four of the answer brief of the corporate defendants filed with the Court of Appeals, found at page 8 of this petition merges with the orders to provide a mirror image and admission of the fraud exercised to defeat the petitioners' rights under the law and to thwart any appeal. Page four admitted the fraud upon both courts. Authority closely in point is Hazel-Atlas Glass Co. v. Hartford-Empire Co. (1944), 322 U.S. 238, 64 S.Ct. 997,1001:

> Every element of fraud here disclosed demands the exercise of historic power of equity to set aside fraudulently begotten judgments * * * we find a deliberately planned and carefully executed scheme to defraud not only the patent office but the circuit court of appeals. * * * proof of the scheme, and of its complete success up to date, is conclusive.
>
> Futhermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It involves a wrong against the institution set up to protect and safeguard the public, institutions in which fraud can not complacently be tolerated consistently with the good order of society. Surely it can not be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be moot and helpless victims of deception and fraud.

The void nature of the orders is not without precedent. "Courts are constituted by authority, and they can not go beyond the power delegated to them. If they act beyond the authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal." Valley v. Northern F.& M. Ins. Co. (1920), 65 L.Ed. 297,300. "If * * * the court's action involves a plain usurpation of power, the court's judgment is void, even though it has the

requisite jurisdiction over the parties or res as the case may be." 7 Moore's, Federal Practice, Void Judgment, Section 60.25[2]; United States v. Walker (1883), 109 U.S. 258,266.

"* * * a judgment by a court having jurisdiction over both the subject matter and the parties is void where it proceeds in such an arbitrary or improper manner that is actions may be said to constitute a denial of due process." 7 Moore's, Federal Practice, Void Judgments, 60(b)(4) Section 60.25[2], citing Windsor v. McVeigh (1876), 93 U.S. 274,277-278,283-284; Hovey v. Elliot (1897), 167 U.S. 409,414.

"Though the court may possess the jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and can not then transcend the powers conferred by the law. * * * they would be absolutely void; because the court in rendering them would transcend the limits of its authority * * * so a departure from established modes of procedure will often render the judgment void." Windsor v. McVeigh, supra, at 23 L.Ed. 914,917, and the following at pages 915-916:

> The principles stated in this terse language lies in the foundation of all well-ordered systems of jurisprudence. Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to the respect of any other tribunal. * * * it would be like saying to a party, appear and you will be heard; and, when he appears saying your appearance shall not be recognized, and you shall not be heard.

The principle meaning of Windsor v. McVeigh, supra, is enlarged in Hovey v. Elliot (1897), 167 U.S. 215,220:

> The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without hearing whatsoever is, in the nature of thing, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of all that attribute of justice upon which the exercise of judicial power necessarily depends.

The petitioners' property interest in their right to present claims authorized by the Robinson-Patman Act and their right to lodge an appeal authorized by 28 U.S.C. Section 1291 were rights broadly protected by the Fifth Amendment as not to be deprived "without due process of law." However, the District Court orders are not merely void by contravening the law. They also subverted the petitioners' constitutional rights to be heard, except in form. Moreover, the orders were designed, through claims emptied by the prior orders and supplied by the defendants unjustly and unlawfully for the petitioners, to subvert; any right of appeal from the arbitrary usurpations of power.

In following the reasoning of Windsor v. McVeigh, supra, and Hovey v. Elliot, supra, the Court in Bass v. Hoagland (CA 5th 1949), 172 P.2d 205 was addressing the power usurped by a trial judge in denying a requested and unwaived right to a jury trial. The court made the analogy to the denial of the right of assistance to counsel in a criminal case. The analogy further flows to the case of these petitioners. The Court, at page 210, declared the broad rule of constitutional protection:

> We believe that a judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void, and attackable collaterally by habeas corpus if for crime, or by resistance to its enforcement if a civil judgment for money, because the United States is forbidden by the fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition.

The petitioners have elected to resist the subversion of their substantive and constitutional rights by asking this Court to grant writ relief and a reversal.

2. The Conclusionary Denial Of Any Right Of Appeal.

The critical point is the persistent assumption by the Court of Appeals that uneconomic claims remain for trial. By refusing to consider the prior orders and their effect, the Court of Appeals misapprehended the case and inadvertently denied any right of appeal and endorsed orders which operated to defeat the law itself as declared by this Court.

By accepted standards of judicial review, the subtle language of the orders of February 28, 1984 (App. E, 10 a), and April 18, 1984 (App. F 13 a) would show effective dismissal of all of the Burggrafs' tire sales claims for lack of detail facts, in contravention of law. "* * * a decision 'final' within the meaning §1291 does not necessarily mean the last order possible to be made in a case. * * * the requirement of finality is to be given a practical rather than a technical construction." Gillespie v. United States Stel Corporation (1964), 379 U.S. 148,152.

The unprecedented act of allowing the defendants to provide detail allegations, empted by the cut off of essential discovery and element of complicity, denied the lawful existence of any tire sales claims and operated to violate the just intent of the law, including Rule 15(a), F.R.Civ.P. Such act operated to void the complaint at its inception and deny any right to be heard and to thwart appeal thereafter, i.e., the violations of due processes of the law.

The non-appeal sanction for dismissals, with prejudice, under Rule 41(b), F.R.Civ.P., was intended to apply to unreasonable and intentional inaction or dilatoriness, as expressed in Link v. Wabash Railroad Company (1962), 370 U.S. 626, 8 L.Ed.2d 734,738,740. Such criteria does not apply to the case at bar except for a superficial view of the prior orders and conclusory dismissal. By deferring to the gray area of discretion of the trial Court and by inferring the existence of uneconomic claims, as contended by the defendants, the Court of Appeals affirmed the conclusory dismissal with its conclusory decision of February 10, 1986 (App. A, 2 a):

> Plaintiffs also seek appellate review of various interlocutory orders, including a pratial summary judgement, summary judgment as to various defendants, entered by the District Court during the course of litigation, resulting in plaintiffs' refusal to proceed on the day of trial. Those issues are not properly before us.

By its misconception of the usurping and void orders of the District Court, the Court of Appeals weighed the propriety of the dismissal and denied any right of appeal by ignoring the effect of the prior orders. In so doing, speculation is required as to the detail findings and exactness of the basis of the fairness of the ultimate conclusion. This duty was expressed by the Tenth Circuit Court in United States v. Horsfall (CA 10th 1959), 270 F.2d 107,110:

> Rule 52(a) provides that when findings of fact are made in actions tried by the court without a jury, neither objections to the findings, motion to amend, or motion for judgment are necessary to raise the question of the sufficiency of the evidence to support the findings. * * * The Supreme Court has

said that there 'must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can rationally be predicted.'", citing Kelley v. Everglades Drainage District, (1943) 319 U.S. 415.420, 63 S.Ct. 1141,1144.

The net effect of the conclusory decision of the District Court and of the Court of Appeals was to effectively deny the Burggrafs' property interests in their right to be heard and to appeal under the due processes of law. By analogy, "Appear and you will be heard; and, when he appears, saying, Your appearance will not be recognized, and you shall not be heard." Windsor v. McVeigh, supra, at 23 L.Ed. 917.

3. The Writ of Mandamus.

The five orders of the District Court (App. D-H, 6 a- 20 a) when construed together, show more than injury to the just and due process rights of the Burggrafs. They challenge "the integrity of the judicial process * * * the public welfare demands that agencies of public justice be not so impotent that they must always be moot and helpless victims of deception and fraud." Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra, at 64 S.Ct. 1001.

Because of the appeal thwarting nature of the five orders of the District Court, the issuance of a writ of mandamus to the District Judge for a clarification of its conclusory dismissal order would not appear to be effective. However, the issuance of such writ to the Court of Appeals is essential. The Judges of the Court of Appeals did not make findings "in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion of fairness can be rationally be predicated." United States v. Horsfall, supra, at 270 F.2d 110. "* * * the appellate court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case, and will ordinarily be subjected to much unnecessary labor." Virginian Railway Company v. United States (1926), 71 L.Ed. 463,472, 272 U.S. 657.

The purpose of the writ of mandamus extends to actions of the District Court which thwart or attempt to thwart appeal review of rulings and to cause a lower court to comply with its duties. These principles are expressed in Roche v. Evaporated Milk Ass'n (1943), 319 U.S. 21, 63 S.Ct. 938,941:

> In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action. * * * trial court * * * action or omission on its part has thwarted or tends to thwart appellate review of the ruling * * * The traditional use of the writ in aide of appellant jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.

The July 2, 1986 decision of the Court of Appeals in denied the Burggraf motion for relief under Rule 60(b), F.R.Civ.P., and mandamus relief for a clarifying decision from the District Court, in summary form. It is included in the revised printing under Appendix J. The Burggrafs assume that said decision remains consistent with the earlier assumptions of the Court.

The February 10, 1986 opinion of the Court of Appeals is conclusory. A writ of mandamus should issue directing the Court of Appeals to comply with its duty to consider the entire appeal record and make findings of fact affording a clear understanding by the Burggrafs and this Court of the basis of the opinion. Considering the nature of the five orders of the District Court and the failure of duty of the Court of Appeals to review the unjust, illegal and void nature of the four prior orders, the writ is essential because of the demands of due process and justice.

"The work of appellate judges is facilitated when judges make findings of fact that explain the basis for controversal rulings. * * * there are occasions when an explanation of the reasons for decisions may be required by the demands of due process * * *." Harris v. Rivera (1981), 454 U.S. 339, 70 L.Ed.2d 530,535.

CONCLUSION

This writ relief should issue. Companion with the thwarting of the Burggrafs' rights under the due processes of the law, the law itself and the proper function of the federal courts have been challenged by the conduct of the respondents.

A voiding, reversal and remand of the decisions of the District Court and the Court of Appeals with directions, including that for a new trial judge, is warranted under the facts and the law of the case.

RESPECTFULLY SUBMITTED,

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COUNSEL OF RECORD
FOR PETITIONERS

APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THE BURGGRAF CORPORATION, an Oklahoma corporation, and DISCOUNT TIRES OF OKLAHOMA, INC., an Oklahoma corporation, by and through LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, shareholders, and LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, individually, Plaintiff-Appellants, v. THE GOODYEAR TIRE & RUBBER COMPANY, a corporation, THE LEE TIRE AND RUBBER COMPANY, a corporation, THE KELLY-SPRINGFIELD TIRE COMPANY, a corporation, CLARENCE BURGGRAF, SHIRLEY BURGGRAF, L. K. NEWELL and GEORGE UTTERBACK, Defendants-Appellees.	FILED Feb. 10, 1986 No. 84-1991 (D.C. No. 82-C-1177-B) (N.D. Okla.)

ORDER AND JUDGMENT

Before BARRETT, MOORE and ANDERSON, Circuit Judges

The Burggraf Corporation, Discount Tires of Oklahoma, Inc., and three individuals, all plaintiffs in this action, appeal from an order of the district court dismissing their complaint, with prejudice, for failure to prosecute, pursuant to Rule 41(b), Fed.R.Civ.P.

Plaintiffs also seek appellate review of various interlocutory orders, including a partial summary judgment, and summary judgment as to various defendants, entered by the district court during the course of litigation, resulting in plaintiffs' refusal to proceed on the day of trial. Those issues are not properly before us. Plaintiffs made no attempt to seek review of the interlocutory orders pursuant to the certification procedure outlined in 28 U.S.C. § 1292(b). Nor did they obtain certification of any of those orders in accordance with Rule 54(b), Fed.R.Civ.P. See TMA Fund, Inc. v. Biever, 520 F.2d 639 (3rd Cir. 1975); accord Dillon v. Lutterman, Unpublished No. 85-2309 (10th Cir. filed June 12, 1985). And, review of those orders in the context of an appeal from a Rule 41(b) Fed.R.Civ.P. dismissal is not permissible under either 28 U.S.C. § 1291 or 28 U.S.C. § 1651, which plaintiffs also invoke. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1980); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Bowe v. First of Denver Mortgage Investors, 613 F.2d 798 (10th Cir.) cert. denied, 447 U.S. 906 (1980); Huey v. Teledyne, Inc., 608 F.2d 1234 (9th Cir. 1979), cert. denied, 458 U.S. 1106 (1982); Hughley v. Eaton Corp., 572 F.2d 556 (6th Cir. 1978); Marshall & Sielaff, 492 F.2d 917 (3rd Cir. 1974).

The only question properly before this court on appeal is whether the district court abused its discretion by dismissing the plaintiffs' complaint, with prejudice, for failure to prosecute. We hold that it did not.

For the reasons stated by the district court, its order dismissing plaintiffs' complaint with prejudice is affirmed.

HOWARD K. PHILLIPS, CLERK

MARCH TERM - April 7, 1986

Before Honorable William J. Holloway, Jr., Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen M. Anderson, Honorable Deanell R. Tacha, and Honorable Bobby R. Baldock, Circuit Judges

THE BURGGRAF CORPORATION, an Oklahoma corporation, and DISCOUNT TIRES OF OKLAHOMA, INC., an Oklahoma corporation, by and through LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, shareholders, and LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, individually,	)	
Plaintiff-Appellants,	)	No. 84-1991
v.	)	
THE GOODYEAR TIRE & RUBBER COMPANY, a corporation, THE LEE TIRE AND RUBBER COMPANY, a corporation, THE KELLY-SPRINGFIELD TIRE COMPANY, a corporation, CLARENCE BURGGRAF, SHIRLEY BURGGRAF, L. K. NEWELL and GEORGE UTTERBACK,	)	
Defendants-Appellees.	)	

This case is before us on appellants' petition for rehearing and suggestion for rehearing en banc, and appellees' motions for sanctions.

Upon consideration of the motions of the parties, the court orders as follows:

1. The petition for rehearing is denied by the panel that rendered the decision sought to be reheard;

2. The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

3. The appellees' respective motions for sanctions in the form of double costs pursuant to Rule 38, Federal Rules of Appellate Procedure and 28 U.S.C. § 1912 are each hereby granted by the hearing panel. Additionally, under the procedures referred to by this court in Sooner Products Company, Plaintiff, Craig Tweedy and Earl W. Wolfe, Appellants, v. Paul McBride, et al, Defendants-Appellees, No. 85-1033, slip op. (10th Cir., April 1, 1986, a copy of which is attached), this case is hereby remanded to the United States District Court for the Northern District of Oklahoma with the direction that the court entertain appellees' motions for sanctions in the form of attorneys' fees pursuant to 28 U.S.C. § 1927, and, upon an evidentiary hearing, to determine whether attorneys' fees should be imposed upon appellants' counsel and, if so, the amount thereof.

4. This court reserves jurisdiction over this matter pending results of the hearing on remand to the district court.

ROBERT L. HOECKER, CLERK

MAY TERM - JUNE 25, 1984

Before The Honorable William J. Holloway, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges, United States Court of Appeals

THE BURGGRAF CORPORATION, an Oklahoma corporation, etc., et al,	)	
Petitioners,	)	
v.	)	
HONORABLE THOMAS R. BRETT, United States District Judge for the Northern District of Oklahoma,	)	No. 84-1877
Respondent.	)	

ORDER

On consideration of the petition for writ of mandamus, the court finds and concludes as follows:

The petition alleges essentially abuses of discretion by extreme curtailment of essential discovery and in the scheduling of discovery and trial, and error by the granting of summary judgment on numerous claims not ripe for such summary disposition. This court is convinced that such claims of error come within those which must be raised on appeal from a final decision, and not in a proceeding for the drastic remedy of mandamus. See Allied Chemical Corporation, et al v. Daiflon, 449 U.S. 33 (1980). Accordingly, pursuant to Rule 21(b), F.R.A.P., the petition is denied.

HOWARD K. PHILLPS, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE BURGGRAF CORPORATION, an Oklahoma corporation, and DISCOUNT TIRES OF OKLAHOMA, INC., an Oklahoma corporation, by and through LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, shareholders, and LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, individually,	)	Filed Dec. 5, 1983
Plaintiff,	)	No. 82-C-1177-B
v.	)	
THE GOODYEAR TIRE & RUBBER COMPANY, a corporation, THE LEE TIRE AND RUBBER COMPANY, a corporation, THE KELLY-SPRINGFIELD TIRE COMPANY, a corporation, CLARENCE BURGGRAF, SR., SHIRLEY BURGGRAF, L. K. NEWELL and GEORGE UTTERBACK,	)	
Defendants.	)	

ORDER

This matter comes before the Court on the plaintiffs' motion for continuance of jury trial of this case, currently set for December 19, 1983, and for discovery conference. Defendants object to the motion. For good cause shown, the motion is granted. Parties shall comply with the following pretrial and trial schedule:

1) A discovery conference is set before U.S. Magistrate Robert S. Rizley on December 15, 1983, at 1:30 p.m.

2) Plaintiffs are to provide defendants with all alleged instances of contemporaneous sales of products which violate the Robinson-Patman Act by January 23, 1984.

3) The names and addresses of all witnesses, including expert witnesses, are to be exchanged in writing by January 30, 1984.

4) All discovery will be completed by February 20, 1984.

5) Any dispositive motions the defendants wish to file shall be filed by March 2, 1984; plaintiffs' response to such motions shall be filed by March 18, 1984.

6) Pretrial conference of this case will be April 3, 1984, at 9:15 a.m.

7) An agreed pretrial order shall be filed April 6, 1984. The parties will also exchange lists of all exhibits by this date.

8) Suggested voir dire, suggested jury instructions, and trial briefs shall be filed April 9, 1984.

9) Jury trial of this matter is set for April 16, 1984, at 9:30 a.m.

ENTERED this 2nd day of December, 1984.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE BURGGRAF CORPORATION, an Oklahoma corporation, and DISCOUNT TIRES OF OKLAHOMA, INC., an Oklahoma corporation, by and through LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, shareholders, and LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, individually,	)	Filed Feb. 28, 1984
Plaintiff,	)	No. 82-C-1177-B
v.	)	
THE GOODYEAR TIRE & RUBBER COMPANY, a corporation, THE LEE TIRE AND RUBBER COMPANY, a corporation, THE KELLY-SPRINGFIELD TIRE COMPANY, a corporation, CLARENCE BURGGRAF, SR., SHIRLEY BURGGRAF, L. K. NEWELL and GEORGE UTTERBACK,	)	
Defendants.	)	

ORDER

This matter comes before the Court on the plaintiffs' application for extension of time for discovery, pretrial conference and trial, and defendant's application for an order of dismissal due to plaintiffs' failure to comply with a discovery conference order. For the reasons set forth below, both applications are denied.

A discovery conference in this case was conducted December 1, 1983. At the hearing, the Court noted three previous discovery dates had been set, and questioned plaintiffs' counsel, Hayden Crawford, about the proposed new dates:

THE COURT:	"What if you're not ready in April? Do you still believe that?
MR. CRAWFORD:	"I represent to the Court we'll be ready in April."
THE COURT:	"If you're not then, what about in July?"
MR. CRAWFORD:	"If we're not ready in April we'll dismiss the lawsuit."

The Court, upon repeated assurances from plaintiffs' counsel that they would be ready to go to trial in April, issued an order setting jury trial for April 16, 1984, pretrial conference for April 3, 1984, and discovery cut-off for February 2, 1984. In addition, the Court ordered plaintiffs to provide defendants, by January 23, 1984, with all alleged instances of contemporaneous sales in violation of the Robinson-Patman Act.

On January 24, 1984, plaintiffs informed defendants' counsel by letter of two instances of alleged sales in violation of the Robinson-Patman Act and stated:

> "Within a reasonable period of time . . . the defendants will be able to more fully provide the defendants with a more concise and complete list of contemporaneous sales in violation of the Robinson-Patman Act."

Plaintiffs now seek extension of the deadline for supplying defendants with all alleged instances of contemporaneous sales to April 27, 1984 and indefinite extension of discovery cut-off. Defendants Goodyear Tire & Rubber Company, Lee Tire and Rubber Company, and Kelly Springfield Tire Company have moved for dismissal of the complaint based on plaintiffs' failure to comply with the Court's discovery order by providing them with all alleged instances of contemporaneous sales by January 23, 1984.

In view of the number of extensions already granted in this case, and in view of plaintiffs' reassurances at the December 1, 1983 discovery conference that they could be prepared for trial in April, the Court hereby denies their request for extension of trial, discovery and other pretrial dates. The Court grants plaintiffs until March 9, 1984 to provide defendants with any additional instances of alleged contemporaneous sales in violation of the Robinson-Patman Act. If plaintiffs fail to provide any additional alleged instances, they will be restricted to asserting only the two incidents previously alleged. Defendants are to file dispositive motions by March 16, 1984, and plaintiffs are to respond to dispositive motions by March 28, 1984.

ENTERED this 28th day of February, 1984.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE BURGGRAF CORPORATION, an Oklahoma corporation, and DISCOUNT TIRES OF OKLAHOMA, INC., an Oklahoma corporation, by and through LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, shareholders, and LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, individually,	)	
Plaintiffs,	)	No. 82-C-1177-B
v.	)	
THE GOODYEAR TIRE & RUBBER COMPANY, a corporation, THE LEE TIRE AND RUBBER COMPANY, a corporation, THE KELLY-SPRINGFIELD TIRE COMPANY, a corporation, CLARENCE BURGGRAF, SR., SHIRLEY BURGGRAF, L. K. NEWELL and GEORGE UTTERBACK,	)	
Defendants.	)	

ORDER

This matter comes before the Court on the motion for summary judgment of corporate defendants Goodyear Tire & Rubber Co., Lee Tire and Rubber Company, and Kelly-Springfield Tire Company. Plaintiffs have responded to the motion and oral arguments have been heard. For the reasons set forth below, the motion for summary judgment is sustained in part and overruled in part.

Summary judgment must be denied if a genuine issue of material fact is presented to the trial court. Exnicious v. United States, 563 F.2d 419, 425 (10th Cir. 1977). In making this determination, the evidence must be viewed in the light most favorable to the party against whom judgment is sought. National Aviation Underwriters, Inc. v. Altus Flying Service, Inc., 555 F.2d 778, 784 (10th Cir. 1977). Factual inferences tending to show triable issues must be resolved in favor of the existence of those issues. Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1377 (10th Cir. 1980). However, summary judgment is proper when no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. Bruce v. Martin-Marietta, 544 F.2d 442, 445 (10th Cir. 1974); Ando v. Great Western Sugar Co., 475 F.2d 531, 535 (10th Cir. 1973).

SUMMARY OF FACTS

Plaintiffs filed this suit in December 1982 claiming violations of the Robinson-Patman Act, 15 U.S.C. §13, by the corporate defendants and common law fraud and breach of fiduciary duty by all defendants. Plaintiff Lola Burggraf and the late Edward Burggraf are the parents of defendant Clarence Burggraf and plaintiffs Larry Burggraf and Jerry Burggraf. Defendant Shirley Burggraf is Clarence Burggraf's wife and a member of the board of directors of the plaintiff corporations. Defendants L. K. Newell and George Utterback are also members of the board of directors of plaintiff corporations.

Since the 1960s, Clarence Burggraf has managed plaintiff corporations. Plaintiffs Jerry and Larry Burggraf were employees of the company until 1981. In 1979, Edward Burggraf died. At that time, Clarence informed other family members the plaintiff corporations were in much worse financial shape than had earlier been apparent. A disagreement over Clarence's management developed and in 1981, Jerry and Larry resigned from employment, although they, along with their mother Lola, remain stockholders in the corporations.

Plaintiffs allege the defendant corporations — Goodyear and its wholly owned subsidiaries Lee Tire and Rubber Company and Kelly-Springfield Tire Company — have for years sold tires to plaintiff corporations at a substantially higher price than that charged competitors such as J. C. Penney and the Tire and Battery Corporation, in violation of the Robinson-Patman antitrust act. Furthermore, they allege the defendant corporations are liable for common law fraud and breach of fiduciary duty for paying kickbacks to the individual defendants as an inducement to buy their tires.

The Court on December 1, 1983, directed plaintiffs to supply defendants with all alleged instances of contemporaneous sales of products which violate the Robinson-Patman Act. Plaintiffs supplied defendants with seven specific sales and in addition produced a computer printout which plaintiffs claim show violations of the Robinson-Patman Act. Apparently, through this printout, plaintiffs have attempted to connect the sales of 8,641 Star brand tires to sales of other brand tires to show price discrimination. Plaintiffs do not indicate which sales at which locations on what dates and at what prices violated the Act.

Defendants have moved for summary judgment on plaintiffs' Robinson-Patman claim on the basis the alleged contemporaneous sales do not comprise violations of the Act and on plaintiffs' common law claims on the basis plaintiffs present no evidence which in any manner supports their allegations of fraud and breach of fiduciary duty.

THE ROBINSON-PATMAN CLAIMS

The computer printout showing sales of 8,641 tires does not comply with the Court's order to supply defendants with specific designations of alleged contemporaneous sales. Therefore, defendants' motion for summary judgment is sustained with regard to the alleged sales listed in the computer printout.

With regard to the remaining alleged instances of contemporanoues sales, plaintiffs must show the following elements:

1) Price discrimination arising out of at least two consummated and contemporaneous sales;

2) involving commodities of like grade and quality;

3) likely to result in an injury to competition — i.e., substantially to lessen competition or tend to create a monopoly in a line of commerce.

15 U.S.C. §13(a).

Once the prima facie case is established, defendants may nevertheless justify the challenged conduct by showing the price differential:

1) is justified by differences in costs of manufacture, sale or delivery;

2) was in response to changing market conditions; or

3) was made in good faith to meet an equally low price of a competitor.

15 U.S.C. §13(b)

Plaintiffs have alleged the following instances of contemporaneous sales:

1) March 30, 1983 sale to the Tire and Battery Corporation (TBC) and March 7, 1983 sale to Burggraf;

2) Sale on the same date of another tire to TBC and Burggraf at different prices;

3) October 6, 1982 sale to TBC and July 22, 1982 sale to Burggraf;

4) March 19, 1979 sale to TBC and February 14, 1979 sale to Burggraf;

5) February 10, 1981 sale to Burggraf, June 30, 1981 sale to TBC and August 15, 1981 sale to TBC;

6) August 12, 1980 sale to TBC and August 8, 1980 sale to Burggraf;

7) September 30, 1982 sale to TBC and July 16, 1982 sale to Burggraf.

Defendants contend in each alleged instance the sales were not of tires of like grade and quality. Defendants also contend many of the sales were either consummated or were not contemporaneous. Plaintiffs, however, introduce the affidavit of Jerry Burggraf stating in his opinion as a tire dealer, the tires sold in each alleged instance are of like grade and quality.

The Court concludes upon reviewing the evidence submitted by the parties a material question of fact remains as to whether the seven alleged instances constitute violations of the Robinson-Patman Act. Therefore, summary judgment as to these seven instances is inappropriate. Exnicious v. United States, supra.

COMMON LAW CLAIMS

Plaintiffs claim the corporate defendants through certain officers and agents have paid Clarence Burggraf kickbacks in return for buying their tires, and are thus liable for common law fraud and breach of fiduciary duty. In support of this claim, plaintiff Jerry Burggraf states by way of affidavit that he knows two officials of Kelly sought to discourage Larry Burggraf from pursuing lower price opportunities with Lee by the promise of sizeable tire price reductions to the plaintiff corporations, and that Clarence Burggraf became angered by these reductions, prompting one Kelly official to suggest Larry Burggraf be fired to avoid further price difficulties. This statement is insufficient to raise any inference corporate defendants paid kickbacks to Clarence Burggraf. Nor do plaintiffs present any other evidence supporting their claim for damages for common law fraud and breach of fiduciary duties. Indeed, both Larry and Jerry Burggraf testified in depositions they had no knowledge of "kickbacks", rebates or any other commissions paid by the corporate defendants to Clarence Burggraf.[1] Because no genuine issue of material fact remains, the corporate defendants are entitled to summary judgment as a matter of law on the common law claims. Bruce v. Martin-Marietta, supra.

CONCLUSION

Plaintiffs have filed a motion for reconsideration of the Court's order of February 28, 1984, declining to extend discovery. The original deadline for completion of discovery was May 24, 1983. That date was extended upon plaintiffs' request to July 20, 1983.

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[1] See October deposition of Jerry Burggraf, pp. 84-85, deposition of Larry Burggraf, p. 148.

The July 20 cutoff date was then extended to November 21, 1983, again at plaintiffs' request. Finally, after a discovery conference December 1, 1983, the Court again extended discovery cutoff to February 20, 1984. During the discovery conference, counsel for plaintiffs repeatedly assured the Court plaintiffs would be prepared to proceed to trial if the requested extension was granted.

In view of the numerous extensions of discovery in this matter, the Court hereby overrules plaintiffs' motion for reconsideration. No additional discovery will be permitted.

The corporate defendants' motion for summary judgment is sustained with regard to plaintiffs' common law claims and to claims of violation of the Robinson-Patman Act in the sale of the 8,461 tires listed on the computer printout. The motion for summary judgment is overruled with regard to the seven specific instances of alleged contemporaneous sales in violation of the Robinson-Patman Act.

This matter is set for jury trial June 18, 1984 at 9:30 A.M.

Suggested voir dire, suggested jury instructions and any trial briefs are to be filed on or before June 11, 1984.

Pretrial conference will be held June 6, 1984 at 9 a.m.

The parties are to file an agreed pretrial order on or before June 4, 1984. Also on that date, the parties are to exchange list of exhibits to be presented at trial.

ENTERED this 18th day of April, 1984.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Filed

THE BURGGRAF CORPORATION, an Oklahoma corporation, et al.,) Jan. 26, 1984

Plaintiffs,)

v.)

THE GOODYEAR TIRE & RUBBER COMPANY, a corporation, et al.,) No. 82-C-1177-B

Defendants.)

ORDER

This matter comes before the Court on the motion for continuance and motion to vacate of plaintiffs; the motion for summary - judgment of defendants Goodyear Tire & Rubber Company and Lee Tire and Rubber Company; and the motion for corporate defendants to dismiss for lack of subject matter jurisdiction or in the alternative motion to drop parties, motion to sever or motion for separate trial. For the reasons set forth below, the motion for continuance and motion to vacate of plaintiffs is overruled; the motion for summary judgment of Goodyear and Lee is sustained; and the motion to dismiss and alternative motions to drop parties, sever or for separate trial are overruled. However, the trial will be bifurcated as to the Robinson-Patman claims and the common law claims.

Motion for Continuance and Motion to Vacate

Plaintiffs move the Court pursuant to F.R.Civ.P. 60(b) to vacate its orders of February 28, 1984 and April 18, 1984 and continue jury trial of this case. In support of this motion, plaintiffs contend corporate defendants made material misrepresentations of fact to

the Court, and further state plaintiffs have additional evidence of alleged contemporaneous sales by corporate defendants in violation of the Robinson-Patman Act. The Court, having heard oral arguments and reviewed the record, concludes plaintiffs' motion is without merit and should be overruled. With regard to plaintiffs' offer of new evidence, it appears to the Court the evidence also fails to identify with sufficient specificity the alleged contemporaneous sales. Therefore, plaintiffs' motion for continuance and motion to vacate earlier rulings is overruled.

Motion for Summary Judgment

Corporate defendants Goodyear Tire & Rubber Company and Lee Tire and Rubber Company have moved for summary judgment on plaintiffs' Robinson-Patman violation claims on the grounds the five alleged contemporaneous sales in violation of the Act were made by Kelly-Springfield Tire Company; therefore, the other two defendants have no liability. The plaintiffs have conceded the corporate defendants are correct in their analysis, and summary judgment is appropriate. Therefore, the motion for summary judgment of defendants Goodyear Tire & Rubber Company and Lee Tire and Rubber Company is sustained.

Motion to Dismiss and Alternative Motions

The corporate defendants contend the Court lacks pendents jurisdiction over plaintiffs' claims against individual defendants for common law fraud and breach of fiduciary duty; therefore, they urge dismissal of the common law claims against individual defendants. Alternatively, they have moved to drop the individual defendants or sever the lawsuit as to the antitrust claims and the common law claims. The individual defendants oppose the motions.

The Court has reviewed the facts and concludes pendent jurisdiction exists. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Further, in the interest of judicial economy, the Court concludes all claims should be heard at the same trial. However, the Robinson-Patman claims and common law claims against individual defendants will be bifurcated, and the Robinson-Patman claims will be tried first.

IT IS SO ORDERED.

ENTERED this 25th day of June, 1984.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE BURGGRAF CORPORATION, an Oklahoma corporation, and DISCOUNT TIRES OF OKLAHOMA, INC., an Oklahoma corporation, by and through LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, shareholders, and LOLA BURGGRAF, JERRY BURGGRAF and LARRY BURGGRAF, individually,	)	Filed Jul. 5, 1984
Plaintiffs,	)	No. 82-C-1177-B
v.	)	
THE GOODYEAR TIRE & RUBBER COMPANY, a corporation, THE LEE TIRE AND RUBBER COMPANY, a corporation, THE KELLY-SPRINGFIELD TIRE COMPANY, a corporation, CLARENCE BURGGRAF, SR., SHIRLEY BURGGRAF, L. K. NEWELL and GEORGE UTTERBACK,	)	
Defendants.	)	

ORDER

This matter came on for jury trial July 2, 1984. Plaintiffs announced they were not ready to proceed to trial and requested continuance. Defendants objected to continuance of trial and stated they were ready to proceed with the jury trial, pursuant to regular setting.

This suit was filed in December 1982. Discovery cutoff was originally set for May 24, 1983. The discovery cutoff date was extended upon plaintiffs' request to July 20, 1983.

was again extended at plaintiffs' request to November 21, 1983 and jury trial set for December 19, 1983. At a discovery conference December 1, 1983, over objection of defendants, the Court again extended discovery cutoff to February 20, 1984, and set jury trial for April 16, 1984 — after repeated assurances from plaintiffs' counsel that plaintiff would be ready for jury trial in April 1984. On April 18, 1984, the case was reset for jury trial June 18, 1984 due to docket congestion and again for July 2, 1984 for the same reason.

In view of the repeated extensions of discovery cutoff since May 1983, and in view of the delays in the trial settings the Court concludes jury trial of this matter should not be continued over the objection of the defendants. As the plaintiffs are unprepared to proceed to trial, and upon application of defendants, the Court hereby dismisses with prejudice the plaintiffs' claims against defendants, for failure to prosecute, pursuant to F.R.Civ.P. 41(b).

ENTERED this 3rd day of July, 1984.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

§13. Discrimination in price, services, or facilities

(a) Price; cost justification; quantity limits; selection of customers; changing market conditions. It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competiton or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing

herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(c) Payment or acceptance of commission, brokerage or other compensation. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other itermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities. It shall be unl;awful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale, of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms ot all other customers com peting in the distribution of such products or commodities.

(f) Knowingly inducing or receiving discriminatory price. It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

MAY TERM - JULY 1, 1986

Before Honorable James E. Barrett, Honorable John P. Moore, Honorable Stephen H. Anderson, Circuit Judges

THE BURGGRAF CORPORATION, an Oklahoma corporation, et al,	)	
Plaintifs-Appellants,	)	
vs.	)	No. 84-1991
THE GOODYEAR TIRE & RUBBER CO., a corporation, et al	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellants' motion for relief under rule 60(b), Federal Rules of Civil Procedure and applicaiton for rule nisi and writ of mandamus under 28 U.S.C. §1651 with supporting brief.

Upon consideration whereof, appellants' motion and all relief prayed for therein is denied.

ROBERT L. HOECKER, Clerk